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No. 83-1275

# In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OREGON  
DEPARTMENT OF COMMERCE,

Petitioner,

v.

TOMMY G. PAYNE,

Respondent.

Response to the Petition for a  
Writ of Certiorari to the Court of Appeals of  
the State of Oregon

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## QUESTIONS PRESENTED

1. Respondent accepts the proposition that this case does involve the acceptability of a pre-termination notice which violates the due process clause's 14th Amendment because it does not specify particular dates, places and persons.

2. This case does not present the questions attempted to be raised by petitioner in its second listing; i.e., whether full back pay is allowable as a remedy when a discharge is found wrongful because of a procedural defect in the pre-termination process which violates the 14th Amendment due process clause. Amongst others, the following distinctions exist in this case:

a. The insufficiency of notice of charges was one of a series of defects occurring during the pre-termination process.

b. The pre-termination defects irretrievably tainted the post-termination hearing.

## TABLE OF CONTENTS

	Page
Questions Presented . . . . .	i
Supplemental Statement of the Case . . . . .	1
Conclusion . . . . .	6
Appendix A . . . . .	App-1

## TABLE OF AUTHORITIES

Cases Cited	Page
Gunsolley vs. Bushby, 19 Or. App. 884, 529 P.2d. 950 . . . . .	4



Respondent Tommy Payne respectfully responds herein in opposition to the Petition for a Writ of Certiorari.

### **SUPPLEMENTAL STATEMENT OF THE CASE**

Issuance of the charges involved here and the conduct at the pre-dismissal hearing are described by the Employment Relations Board as follows:

"Appellant was suspended pending pre-dismissal process on April 29, 1981. By letter of the same date Respondent notified Appellant of the charges against him but did not divulge the source of their information, the regulatee's Appellant allegedly contacted, nor the kind of R.V. material allegedly sold or offered for sale. During the pre-dismissal hearing Appellant was given an opportunity to 'respond' to the charges but again he was not given anymore specifics about the complaints against him. Respondents refusal to divulge specifics of the complaint was based on advise of Counsel. At the pre-dismissal hearing Appellant repeatedly complained about the specifics in the notice, stating that he could not answer the charges without more information. When questioned during the hearing about selling any merchandise to regulatees Appellant denied that he had done so." (Petitioner's Brief App-26, App-27).

At Page App-29 of Petitioner's Brief, the ERB Report shows that it accepted the fact that:

"There is no dispute that the respondent possessed the information at the time of issuance of the pre-dismissal notice and did not divulge it until after Appellant's dismissal." (Underlining part of text).

Also, as quoted at Page App-26 of Petitioner's Brief, the ERB describes a conference of April 27, 1981 in the following terms:

"On April 27, 1981, the Administrator of the Building Codes Division, Trevor Jacobson, and the Section Head, Don Ellinwood (sic), met with Appellant to discuss his interactions with regulatees. Appellant told them that he had purchased two surplus propane tanks from Caribou Manufacturing for a fixed price. In the course of this meeting, Appellant was also asked on a number of occasions whether he had sold or attempted to sell any merchandise to regulatees. He falsely denied ever doing so." (Underlying ours).

The Court of Appeals, as reported in Petitioner's Brief at 5, described the pre-dismissal hearing as follows:

"During his pre-dismissal hearing Payne was given an opportunity to 'respond' to the charges but was not given any more



specifics about the complaints against him. Petitioner's refusal to divulge specifics to the complaints was based on advise of counsel. At the hearing, Payne repeatedly complained about the lack of specifics in the notice, saying that he could not answer the charges without more information. When questioned during the hearing about selling any merchandise to regulated persons or businesses, he denied he had done so."

Respondent Payne has appended to this brief the first three pages of the transcript of the pre-dismissal hearing, to indicate the nature and circumstances of the same. It is disclosed at App-1 that the hearing was one at which Mr. Payne had no counsel in attendance and at of which he was placed under oath prior to his testimony. (App-2).

As the quotations immediately above demonstrate, both the Employment Relations Board and the Court noted specifically the denial made by Mr. Payne regarding whether or not he had sold or offered to sell to regulatees any R.V. components. In the entire record,

this particular statement of Mr. Payne is the only testimony which is denominated "false" by the Employment Relations Board.

Mr. Payne's testimony at the post-termination hearing was measured by the Board as being that of a man who had previously denied falsely the major charge against him. This is due, of course, not only to the insufficient notice of charges; but also to the underlying generalized questions without information, both at the pre-termination conference and again at the pre-dismissal hearing under oath.

It is respectfully submitted that this conduct of the employer is a deprivation of substantial due process which so tainted credibility of the prosecuted witness as to require the proceedings to be null and void.

The Oregon Court of Appeals in the case of Gunsolley vs. Bushby, (19 Or. App. 884, 529 P.2d. 950) dealt with another case also

involving wrongful discharge through unconstitutional procedure. The Court of Appeals stated:

"For purposes of determining a damages formula in a public employee discharge case, it is important to first identify the basis of the discharged employee's cause of action. The possibilities are: (1) a common law breach of contract action; (2) a claim that the discharge was in violation of the substantive standards for discharge stated in an applicable statute or regulation; (3) a claim that the discharge was accomplished in a manner in violation of the the procedural requirements of an applicable statute or regulation; (4) a claim that the discharge was, substantively, for a constitutionally impermissible reason; and (5) a claim that the discharge was, procedurally, accomplished in a constitutionally impermissible manner.\*\*\* The appropriate remedy in the second and fourth situations will ordinarily be reinstatement.

When the claim made and established is that the procedural requirements of law or, as here, the constitution, were violated for a period of time, in general we believe the appropriate measure of damages to be awarded a public employee is solely the employee's lost wages and other benefits during the period of noncompliance."

**CONCLUSION**

It is respectfully submitted that this case, because of gross pre-termination error, does not supply the foundation upon which the Federal question intended to be raised by Petitioner can, in fact, be raised.

Respectfully submitted,  
HAROLD W. ADAMS  
Counsel for Respondent



## **App-1**

### **APPENDIX A**

#### **TRANSCRIPT OF PRE-DISMISSAL HEARING**

DH - Dave Hurd, Hearings Officer  
TP - Tom Payne  
DE - Don Ellinwood  
MJ - Maureen Juhola

At the Labor and Industries Building in Salem, for a hearing regarding those matters contained in the pre-dismissal notice, served on Mr. Tom Payne, said notice is dated April 29, 1981. Parties present at this time are Tom G. Payne, the employee for whom this hearing is being held, Maureen Juhola from the Personnel Section of the Department of Commerce, and also present is Don Ellinwood representing the Department of Commerce Building Codes Division.

My name is David Hurd. I'm the Hearing's Officer selected by the Department of Commerce to conduct these proceedings. I am a Hearings Officer presently employed by the Builders Board within the Department. As stated in the pre-dismissal notice referred to above, Mr. Payne shall, by this proceeding, be afforded an opportunity to refuse or present mitigating circumstances on the charges made against him. This opportunity is made available pursuant to Oregon Revised Statutes 240.555 rule 81-605 of Chapter 8 of the Personnel Rules. Following the hearing, I will submit my findings in writing to the Administrator of the Building Codes Division. Those findings will be based solely on evidence presented during this hearing. It is also noted, the Hearings Officer may

## App-2

question the parties and witnesses at any time during the hearing. Are there any questions so far? Would everyone please stand and raise your right hand. Do you solemnly swear and affirm that the testimony you are about to give is true? Let the records show that all parties that we just named have in fact been sworn in as witnesses.

At this time I would like to read what I consider the essence of this matter. It's what's been characterized as the pre-dismissal notice served on Mr. Payne. Let me start with that.

It's to: Tom G. Payne, Building Codes Division, from Trevor Jacobson, Administrator, Building Codes Division.

Subject: Misconduct charges April 29, 1981. The Memo says, "As an employee of the Building Codes Division of the Department of Commerce in the classification of Plumbing Instructor, you are hereby notified of charges in compliance which potentially justify your dismissal from state service.

Action: Suspension without pay effective April 30, 1981 not to exceed 30 days pending a pre-dismissal hearing for misconduct, malfeasance, insubordination, or unfitness to render effective state service pursuant to ORS 240.555.

### App-3

#### Supporting facts:

1. You are employed to inspect recreational vehicles under construction in mobile homes/R.V. plants throughout the state. You have been issued a state car for official business.
2. By virtue of your position, it is understood that you have the power and authority to economically affect a person in the recreational vehicle business by granting or withholding approval to market a regulated unit in Oregon.
3. During the new employee orientation conducted by the Department of Commerce Personnel Section, you marked on a checklist that the conflict of interest policy had been discussed. You also expressed verbally to me on April 27, 1981 that you are knowledgeable about the conflict of interest policy. (Me, of course, being Trevor Jacobson.)
4. You stated before your supervisor and me on April 27, 1981 that you are aware that offering for sale or selling merchandise would be in conflict with Department policy.

#### Charges and complaints:

1. Approximately one year ago you obtained a recreational vehicle related merchandise either by purchase, consignment, or other type of receipt.



#### App-4

2. You attempted to sell recreational vehicle merchandise while performing your inspection duties on at least four occasions to various RV businesses inspected by you in the normal course of your duties.
3. You also transported this merchandise in the trunk of your state car on at least one of these four occasions.
4. You have concealed from your supervisor the fact that you engaged in business transactions with such related business firms or plant owners, that you offered the merchandise for sale during the work hours and on state travel status, and that you were transporting some of this merchandise in a state car.
5. You failed to report your potential conflict of interest.

Hearing will be held to allow you the opportunity to be heard on these charges. At that time you may provide oral or written material in repudiation or mitigation of the charges and complaints. You may, if you choose, provide a written response prior to the hearing. The hearings will be held before the hearing's referee on May 8, 1981 at 10:00 a.m. in Room C of the Labor and Industries Building. You have the right to be represented at the hearing.

**App-5**

DH "I would like, on my own motion, to make this document part of the record, and I will mark it Exhibit 'A' for the record."

"Mr. Payne, I assume you received a copy of this or that you understand what I've just read, and you do realize that you have the right to be represented at this time, is that correct?"

TP "Yes"

DH "So you are familiar with everything I have read and you have no objections, at least to the Exhibit 'A' being made a part of the record?"

TP "No, I do not."

DH "Mr. Ellinwood, do you have any objections to it being made a part of the record?"

DE "No, I do not."

DH "Then, I think, at least in my opinion, it would be appropriate at this time for Mr. Payne to respond in any way he feels appropriate to this pre-dismissal notice that has just been marked Exhibit 'A'. In other words, I'll let him proceed with his opportunity to refute or mitigate the charges. Please proceed Mr. Payne."

App-6

TP "Alright. When I found out about the charges I was rather shocked, but I do not know which companies that are charging me or making statements that I sold anything. This information I would need to help defend myself. Too, I've not sold anything. I have purchased surplus things from plants, but so far it's very minimal, and it was not for sale. And I have a letter from Caribou Manufacturing because I was told that I was supposedly selling propane tanks, which I had gotten two in the past from Caribou Manufacturing, they were scrap tanks, I paid \$10 a piece for them and I bought one junk battery, to make fishing leads out of, which I paid \$5 for."

DH "OK. Let's go through that again. It's your contention that you haven't sold anything to anyone, as it relates to these charges, is that what you said?"

TP "That's correct."

DH "OK. And you said that you did purchase some 'scrap merchandise' as you characterize it, is that accurate?"

TP "Yes."

DH "OK. And you still have that scrap merchandise in your possession?"

**App-7**

TP "Yes sir, I do. I still have the propane tanks. I brought them in today; they are in the back of my vehicle."

DH "OK. You've taken the two scrap propane tanks, is that correct?"

TP "Yes."

DH "By 'scrap', what does that mean, they're no longer usable or salvageable, or what does that mean?"

TP "Well, they were junked by the Caribou Manufacturing. The ones that I have have broken valves and stuff on them, and I do not know why they scrapped them all out. At the time I purchased the two, they probably had 35 or 40 more in a big pile sitting getting rusty. They may have sold these, I don't know to whom."

DH "OK. So you bought two from the Caribou Manufacturing Company, is that correct?"

TP "That's correct. They went to a larger tank on their motor homes and they didn't, I guess they didn't, send them back to the people they bought them from. They've sold thousands of dollars worth of stuff to anybody that wanted to buy it, and this was a year ago when the R.V. industry went down, so . . ."

(TRANSCRIPT CONTINUES)